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IN THE

Supreme Court of the United States

October Term, 1957

No. 753

BENJAMIN INDIVIGLIO, ROSE DIAZ
and VETO GIORDENELLO, *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

(On Behalf of Indiviglio and Diaz)

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(On Behalf of Indiviglio and Diaz)

Petitioners, Benjamin Indiviglio and Rose Diaz, respectfully pray that a writ of certiorari issue to review the *divided* judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on October 31, 1957.

Opinions Below

The District Court rendered no opinion.

The opinion of the Court of Appeals for the Fifth Circuit, Chief Judge Rives dissenting, is printed as Appendix "A", pp. 31-65.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit, Chief Judge Rives dissenting, was entered on October 31, 1957 (R. 1356). Rehearing (as well as petition for hearing en banc) was denied on December 5, 1957 (R. 1391), Chief Judge Rives, dissenting, and Mr. Justice Whittaker extended the time within which to file the Petition for Writ of Certiorari to and including February 3, 1958. The jurisdiction of this Court is invoked under 28 *U.S.C.* Sec. 1254(1).

Question Presented

Have the standards appropriate to the performance of judicial functions in the sensitive area of maintaining proper balance with respect to legal proof in the conduct of a criminal case been maintained *in this cause*, where:

A.

The trial court admitted into evidence against petitioners, Indiviglio and Diaz, over objections, Exhibits 3, 4, 17, and subdivisions thereof, seized from Petitioner, Giordenello, in Houston, Texas, in January, 1956, notwithstanding the arrest was illegal, and the search unauthorized?

(This same evidence, as well as the same facts and circumstances, showing absence of probable cause in procurement of warrant, constituted the basis for Writ of Certiorari, which was granted in October, 1957, being Cause No. 549, now pending before this Honorable Court. Under the circumstances, the court, in admitting such evidence against Indiviglio and Diaz, violated ac-

cepted and constitutionally accepted standards governing proof of guilt).

B.

On cross-examination of crucial government witness, a co-conspirator not indicted, the trial court upon proper motion refused to require the government to produce and make available the witness' contemporaneous statement bearing upon transactions embraced in said witness' direct testimony which was pertinent and relevant for impeachment purposes?

C.

Without any warrant, officers searched the dwelling of Petitioner, Diaz, and after concluding such unreasonable search, placed her under arrest, in violation of the Fourth Amendment of the United States Constitution?

D.

The trial court refused to instruct the jury to determine the guilt or innocence of the various defendants, individually, and without reference to, or consideration of, evidence admitted only against other defendants, thus failing to provide the jury with any legal yardstick against which to appraise the evidence, and denying petitioners due process of law, and depriving them of a jury trial?

The conviction and the affirmance below were based on evidence which should have been excluded as incompetent, irrelevant and remote?

Constitutional Provisions Involved

The various constitutional provisions involved in this case are set out in Appendix "B", p. 66.

Statement of the Case

Petitioners were charged and found guilty, before a jury, of conspiracy to violate provisions of the *Internal Revenue Code* (26 *U.S.C.*, Secs. 4704, 4705, 4742(a), 4744(a), 4753, 4755, 7237(a); 18 *U.S.C.*, Sec. 545). Petitioner Indiviglio was sentenced to a term of four years imprisonment and a fine of $25. Petitioner Diaz was sentenced to a term of two years imprisonment and a fine of $25.

The indictment (R. 4-14) was filed July 18, 1956. It alleged that Petitioners, together with eight other persons, conspired from January 1, 1955 to June 5, 1956, to possess marihuana and to sell and distribute same; to purchase and acquire heroin and to sell and distribute and dispense the same.

* * *

Prior to the filing of this indictment—*January 27, 1956*—Government Exhibits 3, 4, 17, and subdivisions thereof, were seized from Petitioner Giordenello, resulting in conviction in March, 1956.

He appealed, and by a divided court the Fifth Circuit affirmed, 241 F. 2d 575. Writ of Certiorari was granted Giordenello in October, 1957, being No. 549, and is now awaiting final disposition by this Court. *This* application for Writ of Certiorari is definitely related to *Giordenello v. United States*, No. 549.

The government and petitioners stipulated that the evidence affecting the motion to suppress this evidence in the prior hearing and made the basis of Giordenello's contentions in cause No. 549, in this Court, would be the same in this cause as that offered at the hearing held in March, 1956 (R. 1108-1108-D). The renewed motion to suppress was overruled by the Trial Court (R. 1160). By agreement, the entire record of the earlier case is to be considered in this appeal (R. 2-B).

The testimony of the narcotics agent Finely as well as the exhibits proffered as a result of his testimony, and the testimony of the chemist concerning the exhibits was strenuously objected to (R. 234-235, 241, 249, 422 and 809), all of which were overruled (R. 1160; 1123-1160).

Narcotics Agent Finley, who had *no* personal knowledge that Giordenello committed any crime, swore to a complaint which was barren of all facts. After obtaining a warrant from the United States Commissioner, he carried it about for two days as "an investigative technique" while following Giordenello. On January 27, 1956, Narcotics Agent Finley arrested Giordenello and found a quantity of contraband in a paper sack in Giordenello's hand at that time (R. 47).* The complaint alleged simply that the accused:

> "* * * did receive, conceal, etc. narcotic-drugs: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code." (R. 25)

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*(These page citations are taken from the record in the court below - 241 F. 2d 575. The printed record on this phase of the case now pending in this court, is not yet available.)

No witnesses were listed on the complaint subscribed to before the United States Commissioner by the narcotics agent (R. 25). The warrant was addressed "To United States Marshal or any other authorized officer" (R. 22). While the return was signed by a Deputy United States Marshal, the evidence conclusively shows that the warrant was actually executed by Narcotics Agent Finley. No contention was made that the United States Marshal or any of his Deputies participated in the arrest of Giordenello.

Agent Finley readily admitted that he had not "seen him—meaning Giordenello—receive or conceal any heroin-hydrochloride" (R. 30) and "hadn't seen Giordenello with narcotics in his possession" (R. 32). The agent further testified that he never saw Giordenello violate any of the laws of the United States of America, and that he was not prepared to prove that Giorenello did (R. 41).

No proof was offered that the narcotics agent knew, or had probable cause to believe, that Giordenello was committing a felony until he had arrested Giordenello, seized the paper sack from him, and thereupon searched the sack.

* * *

Crucial prosecution witness, Robert C. "Mop" Adams (R. 201) was alleged to be a co-conspirator, but not indicted (R. 4) inasmuch as the narcotics agent (Finley) arranged that the charge against Adams be dismissed in return for testimony (R. 156-157). His testimony consumes approximately 98 pages (R. 107-205). This witness (Adams) acknowledged that he knew six of the persons on trial (R. 107), but did not know these petitioners.

One of the overt acts in the indictment—Overt Act No. 2—(R. 10) alleged that Adams concealed contraband in the home of Defendant, Rodney Peevey "on Keller Street in Houston, Texas." Adams' testimony on this score established (R. 130-135) that the incident took place at Defendant Peevey's apartment—"on Lawndale" (R. 131). Adams testified that Petitioner Giordenello subsequently arrived at this apartment (R. 134).

When cross-examined, Adams stated that he had made and executed a *signed statement* to Agent Finley three or four days (R. 184) after he surrendered in February, 1956 (R. 184). He vigorously denied that he stated in this statement that the incident about which he testified took place on Keller Street (R. 188-189).

Thereupon, the court was requested to direct the Government to produce Adams' written statement given to Agent Finley for use by the defense (R. 189-191), which motion was summarily overruled (R. 190).

Later, the defense applied for a subpoena duces tecum commanding Agent Finley to produce the statement made by Adams (R. 286-287, 290, 1106). This was, likewise, denied by the court (R. 1106).

The government at no point during the trial made claim that the statement issued by Adams was privileged in any respect, that the identity of informers would be made known if the statement was produced to the Petitioners, or that making the statement available was made unlawful by any government regulation. The only statement on the part of the prosecution to the request for this document was the following remark by the United States Attorney:

"Your Honor, I think, first of all with regard to the statement it is an improper request, inasmuch as the witness didn't use the statement to testify from here today" (R. 189).

* * *

Federal and State Officers, without a warrant of any kind (R. 563-564) searched the dwelling occupied by Petitioner Diaz, under a written lease (R. 632), on May 22, 1956. Search of her home consumed approximately two hours (R. 591-592), and was general in nature (R. 610).

The Federal Officers making this search stated that they received information from a narcotics agent in Houston, Texas, before May 12, 1956 (R. 575), and although application for search warrant to authorize a search of this dwelling could have been obtained at almost any time, no such application was ever presented to a United States Commissioner, a Magistrate, or to anyone else.

The Federal Officer justified his conduct in this unreasonable search by stating that it was "based entirely on the circumstances of the moment" and that he determined "the circumstances" (R. 565-566). There was no issue of violence, no moving vehicle, no danger of destruction, removal or concealment of the property seized.

There were no exceptional circumstances justifying the search and seizure of the articles in Petitioner's apartment. Federal Officer William J. Durkin, testifying for the Government, related:

"Q. Then when you got into this apartment that you testify, did you place a person named Rose under immediate arrest?

A. Under immediate arrest?
Q. Yes. Was she put under your control immediately?
A. On entry, after the discovery of the white, powdery substance, Detective Roehling placed her under arrest.
Q. *She wasn't under arrest until that time.*
A. She was not placed under arrest, no, sir.
Q. *In other words, as a result of this search, she was placed under arrest?*
A. Yes, sir" (R. 608).

As a result of this search 29 grains of cocaine (R. 647), which in the opinion of the officers "* * * wouldn't be considered a large stash of narcotics * * *" (R. 635) was found. Additionally, the officers seized what they claimed (but never established) to be a set of books for Dell's Cafe in New York City; personal items belonging to Indiviglio and Diaz—a card bearing a telephone number, address and name of Giordenello, and a piece of paper with the name "Linda Pitronella" written thereon. *The court-appointed attorney for Petitioner Diaz* filed two motions to suppress this evidence (R. 1161-1166). The trial court promised to take up such motions "later on" but never did (R. 585).

Testimony of this unreasonable search was admitted over Petitioner's protest (R. 568, 571, 577-578, 581, 627, 628, 751, 754-755), and the articles seized were admitted in evidence over objections (R. 577-578, 579, 580, 581).

* * *

The Trial Court was requested (R. 1168) to issue the following instruction to the jury:

"Although these defendants are being tried at the same time, you are required and instructed to deter-

mine their guilt or innocence individually. As to each particular defendant, you may consider only the evidence admitted against him, or her, without reference to or consideration of evidence admitted only against other defendants, in deciding whether the government has proved beyond a reasonable doubt that the alleged conspiracy existed and whether or not the particular defendant was a member of such conspiracy."

The charge given by the Court (R. 1178-1206) failed to include this instruction and was marked "Refused" on the bottom of such request (R. 1170).

One of the attorney's, objecting to the charge, requested that the jury be specifically instructed that statements made to police officers by any one of the parties on trial should be considered only against such defendants (R. 1211, 1212, 1213). The Court refused to give this instruction, stating that it was his opinion that this point had been covered by his instruction that the jury could only consider declarations made in furtherance of the conspiracy (R. 1212, 1213).

No instruction was given to the jury placing a limitation upon a juror's acceptance or rejection of evidence at the time it was introduced.

* * *

The Court below, in its majority opinion, consumed 33 pages of its 35-page opinion on the sole point that the opinion in *Jencks v. United States*, 353 U. S. 657, was pure dictum and constituted an illegal amendment to the Federal Rules of Criminal Procedure. The majority opinion let loose a cacophony if ill-tempered and ill-considered statements, among which is the following:

"Whatever undiscovered power the Supreme Court may have in a given case to by-pass, the universally accepted rules of appellate procedure above quoted, we have no such power" (Op. p. 60).

* * *

"The Supreme Court was without authority to go beyond the ruling of the trial court responding to the action it was importuned to take. Whatever branch of procedural jurisprudence should be held to control, the trial court was possessed of discretion to do what it did do, and the appellate court had jurisdiction only to determine whether that discretion was abused" (Op. p. 57).

The majority placed great stress on a speech made on the United States Senate floor by Senator Stennis (Op. p. 59) and an excerpt from Governor Harriman's message (Op. p. 62) to the New York State Legislature. Inferentially, the majority of the Court below reached the conclusion that this court had not exercised judicial responsibility by stating that the majority below reached:

"a result which will tend to combat the widely expressed idea that the courts are manifesting judicial irresponsibility in their apparent efforts to 'protect the big bad wolf from little Red Riding Hood'" (Op. p. 62).

The writer of the majority opinion, authored the opinion in *Jencks v. United States*, 226 F. 2d 540, reversed by this Court in *353 U. S. 657*; also, the majority opinion in *Giordenello v. United States*, 241 F. 2d 575, which is now pending in this Court, after grant of certiorari.

In this assault on the palisade of reason contained in *Jencks v. United States*, 353 U.S. 657, it overlooked other important questions raised in the court below.

Chief Judge Rives, dissenting, stated:

"With deference, I adhere to the views expressed in my dissenting opinion in Giordenello v. United States, 241 F. 2d 575 (5th Cir., 1957), and for the reasons there stated would hold that the evidence obtained by the search of Giordenello was not admissible against him.

I think also that the present decision conflicts with the decision of the Supreme Court in Jencks v. United States, 353 U. S. 657. Robert C. Adams, a co-conspirator not indicted, testified to various unlawful dealings with Giordenello and Kolm, and that Kolm described Benny Indiviglio as an Italian in New York City through whom he secured heroin from overseas, and told him that Benny had a common law wife by the name of Rose, inferably Rose Diaz alias Rose Diviglio. If believed by the jury, Adams' testimony was most damaging to each of the four appellants. Adams had signed a written statement covering all of his transactions relating to these appellants and had given it to Narcotics Agent Finley. Adams' statement was certainly in the possession of the United States, and probably under the control of the United States Attorney. The district court declined to permit the attorneys for appellants to inspect it for the purpose of cross-examining Adams. That ruling of the district court was, of course, prior to the decision by the United States Supreme Court of Jencks v. United States, 353 U. S. 657, 665, et seq. That decision, I think, should require a reversal of these judgments of conviction. I therefore respectfully dissent." (Op. pp. 64-65).

Reasons for Allowance of the Writ and Argument Thereon

A.

The search and seizure from Petitioner Giordenello on January 27, 1956 contravened the Fourth Amendment and the fruits of such search put in evidence against these Petitioners vitiated the judgment of conviction.

The evidence and the facts of this case are identical in all particulars to that contained in *Giordenello v. United States,* 241 F. 2d 575, in which this court granted a Writ of Certiorari in October, 1957. That case is still pending in this Court and is numbered 549. This application for Writ of Certiorari is definitely related to *Giordenello v. United States,* 549, in this Court.

This case, as in Cause 549 in this Court, presents an issue of extreme importance in all federal criminal trials wherein the validity of a search warrant is questioned. That issue is whether a trial judge must require that a search warrant issue only upon "probable cause" supported by sworn testimony and "particularly" describing the area to be searched and the thing to be seized; or whether the Court may bypass that procedure and go forward with the trial, on the basis of its own judgment that bare suspicion alone is sufficient to justify issuance of such warrant. The latter procedure was followed at petitioners' trial and was sustained by the decision below. Obviously this Court, in granting its Writ of Certiorari in Giordenello, supra, (No. 549) took note of the fact that the complaint seeking

a search warrant failed to state the "Essential Facts" needed for the issuance of such warrant, and that the affidavit failed to meet the standards set in *Steele v. United States*, 267 U. S. 498, 500 and in *Dumbra v. United States*, 268 U. S. 435, 440, in which it was stated:

> "The statements of fact contained in the affidavit are based upon affiant's personal knowledge of what he saw, it sets forth evident facts which, in our opinion, establish probable cause * * *."

Needless to say, "probable cause" did not exist in this cause within the definition of *Brinegar v. United States*, 338 U. S. 160, 175-176, and in other representative decisions.

This issue has arisen on numerous occasions and the opinions are uniform in demanding that the person seeking a warrant must tell the Magistrate why he wants it.

This Court stated in *McDonald v. United States*, 335 U. S. 451, 455:

> "Absent some grave emergency, the Fourth Amendment has interposed a Magistrate between the citizen and the police."

The narcotics agent who secured this warrant gave the Commissioner no facts upon which to conclude that probable cause existed. The Commissioner apparently overlooked the fact that "The question is not whether he (narcotics agent) thought the facts to constitute probable cause, but whether the court thinks they did." *Director General v. Kastenbaum*, 263 U. S. 25, 28.

The narcotics agent did not see Petitioner Giordenello with any heroin hydrochloride (R. 30)*, or with any contraband in his possession (R. 32)*. In sooth, the narcotics agent conceded that he never saw Petitioner Giordenello violate any of the laws of the United States (R. 41)*. Thus, the complaint initiated to obtain a warrant necessarily failed because its content was *not* based on personal knowledge and was, otherwise, wholly unsupported by any other proof sufficient to confer jurisdiction on the Commissioner to issue the warrant. The facts here are similar to those in *Rice v. Ames*, 180 U.S. 371, 374, where this Court observed:

> "The * * * complaints * * * were obviously insufficient, since the charges were made solely on information and belief, and no attempt was made even to set forth the source of information or the grounds of affiant's belief."

As matters turned out, the warrant was used only as an "investigative technique" in Agent Finley's language (R. 40)*, and the arrest used as a pretext to search for evidence in defiance of *United States v. Lefkowitz*, 285 U.S. 452, 467.

Inasmuch as the procedural requirements for securing such warrant were not substantially complied with, the warrant itself was worthless and the courts below should have so held.

Government Exhibits 3, 4, 17, and subdivisions thereof, seized from Petitioner Giordenello and introduced in evidence against these petitioners, present, in the most exaggerated form, the issue as to whether these Petitioners are

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*(These page citations are taken from the record in the court below - 241 F. 2d 575. The printed record on this phase of the case, now pending in this court, is not yet available.)

to enjoy the benefit of accepted and constitutionally standards of proof.

The majority decision inferred that these Petitioners had no standing to object to the introduction of this evidence. We are confident that such holding is erroneous.

This unlawfully-obtained evidence was introduced against Petitioners and naturally aided in convicting them in the trial court. The majority ruling is contrary to *McDonald v. United States*, 335 U.S. 451, 456; *Kotteakos v. United States*, 328 U.S. 750, 770-771; *Anderson v. United States*, 318 U.S. 350, 356-357 and *Nelson v. United States*, (U.S. App. D.C.) 208 F. 2d 506, 514, Cert. denied, 346 U.S. 827.

The introduction of such evidence was clearly prejudicial unless it can be established as a certainty (which is impossible here) that the jury's "judgment was not substantially swayed by the error * * * ", *Kotteakas v. United States*, 328 U.S. at p. 765. If this error, "within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did, in fact, influence their verdict." *Little v. United States*, (10 Cir.) 73 F. 2d 861.

In view of the fact that this court has already granted its Writ of Certiorari in Cause No. 549, embracing the same evidence, facts and circumstances, plus the fact that the warrant was absolutely worthless, and introduction of such evidence was erroneous, this Writ of Certiorari should be granted. The question presented here is important, and not susceptible to offhand determination, particularly with regard to admission of the fruits of this search, against petitioners, based entirely upon a worthless warrant.

B.

The majority erred in affirming the ruling of the trial court, which denied Petitioners' request for production of statement of Witness Adams for determination as to relevance and making available to Petitioners such portion of statement as was relevant.

The majority decision in this case is directly in conflict with the decision of this court in *Jencks v. United States*, 353 U.S. 657. This conflict was conceded in the court below by Chief Judge Rives, who dissented, because:

> "That decision, (Jencks v. United States, 353 U.S. 657, 665, et seq.) I think, should require a reversal of these judgments of conviction. I therefore respectfully dissent." (Op. p. 65)

This conflict is best illustrated by the following analysis:

Court below: (Indiviglio, et al. v. United States)	*Supreme Court of the United States* (Jencks v. United States)
In the case before us the motion demanded that the Adams statement be forthwith delivered to appellants . . .	We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for discrediting the Government's witnesses and thereby furthering the ac-

Court below:
(Indiviglio, et al. v. United States)

Supreme Court of the United States
(Jencks v. United States)

cused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. The practice of producing Government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved.

. . . without any showing of probable contradiction or of prejudice to appellants.

We hold that the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony.

* * *

Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testi-

Court below: (Indiviglio, et al. v. United States)	*Supreme Court of the United States* (Jencks v. United States)
	fied, and unless he admits conflict, as in *Gordon*, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible without standards for the administration of criminal justice in the federal courts and must therefore be rejected.
Under *Palmer v. Hoffman*, supra, appellants carried the burden of showing that prejudice resulted as well as of bringing the Adams statement before us.	The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.
It is clear that the Supreme Court in *Gordon*, did not consider whether an accused should have access to documents merely because they *might aid in the preparation of his defense.* It held merely that the three statements which did show in-	The reliance of the Court of Appeals upon *Gordon v. United States* . . . is misplaced. It is true that one fact mentioned in this Court's opinion was that the witness admitted that the documents involved contradicted his testimony.

Court below: (Indiviglio, et al. v. United States)	*Supreme Court of the United States* (Jencks v. United States)
consistencies should be produced.	However to say that Gordon held a preliminary showing of inconsistency a prerequisite to an accused's right to the production *for inspection* of documents in the Government's possession, is to misinterpret the Court's opinion. (Emphasis added.)
It is further clear that, under stare decisis, Jencks would not stand alone, but would take its place alongside of Socony, Goldman, Palmer, Hickman, Bowman, Gordon (none of which have been overruled) . . .	This Court held in *Goldman v. United States* . . . that the trial judge had discretion to deny inspection when the witness "does not use his notes or memoranda (relating to his testimony) in court . . ." *We now hold* that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession . . .
Moreover, it is clear that appellants were not prejudiced by the challenged ruling of the trial court.	We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial.

The necessary impact of the Jencks decision, supra, is that the government must accept the obligations of disclosure once its witness (Adams) is called to the stand.

The author of the majority opinion who is certainly not the epitome of a priest of pure legal reasoning, tells us that Jencks, supra, merely requires:

(1) That statements must be submitted to the trial judge:

(2) When inconsistency is actually shown, because:

> "* * * the Supreme Court had nothing before it but the question whether the trial court erred in denying the two motions based and argued solely on the predicate that a showing of inconsistency had been made; and upon their concession, based on the law as then well-established that the statements must first be submitted to the court for its decision on relevance and materiality." (Op. p. 57).

Not only is this statement at war with the Jencks decision, but it overlooks two decisions from this court since the date of the Jencks decision, which were reversed on the basis of the Jencks opinion, *Scales v. United States*, 78 S. Ct. 9 and *Lightfoot v. United States*, 78 S. Ct. 10.

In the latter cases the Solicitor General confessed error, which in no way dislocates these reversals as authoritative decisions of this court since "* * * such a confession does not relieve this court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Young v. United States*, 315 U.S. 257, 258.

In *Scales v. United States* (4 Cir.), 227 F. 2d 581, 592:

> "* * * there was no suggestion that they (F.B.I. reports and statements of Cluntz and Childs) contained anything contradictory of testimony given by these witnesses on the trial, and the trial judge, who examined the statements, held that there was nothing in them contradictory of that testimony."

In *Lightfoot v. United States* (7 Cir.), 228 F. 2d 861, 868:

> "* * * nothing was developed on cross-examination to the effect that the report to the F.B.I. conflicted with the direct testimony of Brzek."

Nevertheless, this court reversed both of these convictions on the authority of Jencks, because the defense were not permitted to see the statements, even after they were examined by the trial court who announced that they contained nothing contradictory.

Certainly, Scales and Lightfoot are authority for reversal in this cause, if it be deemed that Jencks is found wanting for reversal.

The majority of the court below stated:

> "* * * appellants carried the burden of showing that prejudice resulted, as well as of bringing the statement before us."

It is elementary that there was no way for petitioners to establish prejudice, inasmuch as they never saw the Adams' statement. Quite the opposite is true because the obligation is upon the government to show that petitioners were not prejudiced. Judge Learned Hand cau-

tioned in *United States v. Andolschek* (2 Cir.), 142 F. 2d 503, 506:

> "We cannot, of course, know, as the record stands, how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial; for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U.S.C. 391."

The position of Petitioners is no different from that which existed in *United States v. Beekman* (2 Cir), 155 F. 2d 580, 584, where the late Justice Jerome Frank observed:

> "* * * defendant's counsel could not ask that the documents be sealed and made a part of the record for appeal purposes, since the trial judge held that they need not be produced in court."

The facts here are similar to those delineated in the recent case of *Communist Party of United States v. Subversive Activities Control Board*, (26 LW 2332), decided on January 9, 1958 (Prettyman, J.) wherein the Court (U.S. App. D.C.) observed:

> "We hold that, where the government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the Jencks case, as we read it, is based upon the elementary proposition that the interest of the

United States is that justice be done. The same elementary proposition applies here and leads to the same result."

The effect of the majority opinion in this cause on future cases demands resolvement of the conflict between it and opinions of this court. This is an issue having the most fundamental bearing upon the essentials of our criminal law. And the number of cases embracing this principle is sufficient to demonstrate the importance of a definitive opinion by this Court. The Writ of Certiorari should be granted.

C.

Search of Petitioner Diaz's dwelling, without warrant, in violation of the Fourth Amendment, was unreasonable and evidence thus secured and used to convict was illicit and vitiates these convictions.

The decisions of this Court, including dissenting opinions therein, demonstrate that search of a residence *without a warrant, and not made incidental to an arrest*, is clearly unreasonable and in violation of the Fourth Amendment. The requirement for a search warrant based upon a complaint submitted to the disinterested judgment of a Magistrate was entirely ignored by the officers in this case.

In this cause there was no reason why a search warrant should not have been obtained. Federal agents in New York City received information from a narcotics agent in Houston, Texas, before May 12, 1956 (R. 575), suggesting an investigation and probable search. The search of Diaz's dwelling, occupied under a written lease (R. 632), occurred on May 22, 1956. A total of two hours (R. 591-592) was consumed in making the search, gen-

eral in nature (R. 610). Petitioner was not placed under arrest *until after the search had been completed and 29 grains of cocaine* (R. 647) *were found lodged in the baseboard in the apartment.* The officers, four in number, also seized a set of books, personal items belonging to these Petitioners, a note bearing a telephone number, address and name of Petitioner Giordenello, and a piece of paper with the name "Linda Pitronella" written thereon. Testimony relating to this unreasonable search was objected to (R. 568-571, 577-578; 581, 627-628, 751, 754-755) and such property was admitted over Petitioner's protests (R. 577, 578, 579, 580, 581). *The court-appointed attorney for Petitioner Diaz* filed two motions to suppress this evidence (R. 1161-1166) during the course of the trial. The trial court agreed to take these motions up, but never did (R. 585). Failure of the trial court to act on these motions to suppress placed petitioners in an incredible dilemma. This court has held that such a motion is not necessary and that a person may raise this issue at the trial itself. *Agnello v. United States,* 269 U.S. 20, 34; *Gouled v. United States,* 255 U.S. 298, 312; *Amos v. United States,* 255 U.S. 313. At least one Circuit Court has held that such motion challenging the constitutionality of an unreasonable search may be raised after a verdict of guilty has been rendered. *United States v. Asendio* (3 Cir), 171 F. 2d 122.

Petitioner Diaz had standing to challenge. *McDonald v. United States,* 335 U.S. 456; *Ingram v. United States* (9 Cir.), 113 F. 2d 966. The effect of the majority opinion is to extend the right of incidental seizure to such a proportion as to obviate the need for obtaining a search warrant. Likewise, it attempts to clear the way for exploratory crusades on the homes and premises

of individuals. This court has repeatedly held that search of a residence under similar circumstances, without any vestige of warrant is unlawful. *Taylor v. United States*, 286 U.S. 1; *United States Lefkowitz*, 285 U.S. 452; *Davis v. Donovan*, 265 U.S. 257; *Johnson v. United States*, 336 U.S. 10; *McDonald v. United States*, 335 U.S. 451; *Kremen v. United States*, 353 U.S. 346.

Agnello v. United States, 269 U.S. 20, 33, is still the law, and denounces the type of search here conducted:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant, and such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

This search without a warrant cannot be condoned on any ground because:

> "Vindicated anticipation of what an illegal search may reveal does not validate a search otherwise illegal." *Lustig v. United States*, 338 U.S. 74, 80.

The warning given in *United States v. Lefkowitz*, 285 U.S. 452, 464, to the effect that:

> "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime"

is still applicable.

This type of search is precisely the type which has been condemned as violative of the Fourth Amendment.

It is not reasonable to allow, without warrant of any description, rummaging through the dwelling of an individual and after discovering what the officers conceive to be evidence, place the individual under arrest. This is the type of search and seizure which goes a great deal further than the search of a person at the time of an arrest to avoid his escape or to prevent harm visiting the officer and it goes far beyond allowing a search and seizure of that which is in open and physical relation to the individual so as to be practically an extension of the individual.

In *Kremen v. United States*, 353 U.S. 346, there was involved the seizure of the entire content of the premises. Here, the issue of seizure of the entire contents of the apartment does not exist, but the intrusion into privacy is just as significant. The Kremen decision held that such seizure went far beyond any authorized by previous opinions of this court. This court should grant Certiorari, to harmonize and apply the principles of previous decisions in settling the issue as to the legality of search and seizure under the Fourth Amendment, and also that the conduct of the trial judge was demonstrably fair to petitioners. For

> "* * * to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offut v. United States, 348 U.S. 11, 14." In re *Murchison*, 349 U.S. 133, 136.

D.

The convictions offend due process inasmuch as the trial court refused to instruct the jury concerning the effect of evidence limited only to certain defendants.

It is sophomoric learning that conspiracy indictments are more general in scope and the evidence required for conviction in conspiracy trials can be more circumstantial and indirect, than that involved in substantive offenses. The degree to which prosecutors have availed themselves of a joinder of broad conspiracy counts with substantive counts in order to secure conviction of particular defendants, was the basis for criticism by members of this court. *Krulewitch v. United States*, 336 U.S. 440, 445-458; *Pinkerton v. United States*, 328 U.S. 640, 644 fn. 4). Even where this court has evidence, submitted in a case in which conspiracy and substantive offenses are joined, to apply to the substantive offense, or has concurred in the use of admissions or declarations of one co-conspirator aganst another, this court has been careful to note that the trial court must be circumspect in the admission of such evidence. For instance, the majority of this court, in *Lutwak v. United States*, 344 U.S. 604, 619, warned:

> "These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose."

The *dissenting opinion* in that case denounced the fact that "one of the additional leverages obtained by the prosecution through proceeding as for conspiracy instead of as for the substantive offense is that it may get into evidence against one defendant acts or admissions which color the

case against all.'" (344 U.S. at 623) The government's vague theory concerning conspiracy in this case, probably finds solace in the characterization given this form of criminal accusation some years ago by a famous justice, "the darling of the modern prosecutor's nursery."

In spite of the fact that the trial court was requested to instruct the jury to determine the guilt or innocence of the ten defendants individually (R. 1168), the record plainly shows the absence of meticulous judicial identification of the evidence admitted. The record is devoid of any indication that the trial judge was sufficiently concerned to define which evidence applied to which defendants. Plainly, there was a complete intermingling of all the evidence on all of the defendants. It is wholly impossible to remove the effects of the evidence which should have been confined solely to the conspiracy charges from the judicial process at the trial of this case, which resulted in the mass convictions.

In its consideration of this issue, the court below completely brushed aside the fact that such error to instruct the jury on the part of the trial judge saturated this trial with impropriety and a lack of regard for petitioners' rights before the judge and jury, under the special circumstance of this case. *Kotteakos v. United States*, 328 U.S. 750, 769-772; *Bollenbach v. United States*, 326 U.S. 607; *Paoli v. United States*, 352 U.S. 232.

When the trial court refused the requested instruction (R. 1178-1215) and, instead, advised the jury that:

> "* * * you are entitled to consider all of the physical facts and circumstances and all of the acts and declarations of the parties which might, in your

opinion, in any way tend to throw any light on their motives or intentions in this case" (R. 1195),

all hope of any juror in this case placing any limitation on the evidence at the time of its introduction, was lost.

Faith that Due Process will always prevail and that justice cannot be rationed like a commodity is essential, even if it be a mere grain of devotion or a faith that appears fantastic, Credo quia absurdum. This court should grant Certiorari in order to insure that the ingredients of due process under the Fifth Amendment will be enforced, and to indicate the extent to which an erroneous refusal to submit a proper requested charge to the jury vitiates the proceedings and the evidence thus admitted. The affirmance of these convictions are in obvious and direct conflict with the fundamental principles elaborated by this court in *Krulewitch v. United States*, 336 U.S. 440 and other representative cases and in conflict with other principles of law. This court should not hold its review from such judicial procedure.

Conclusion

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 16440

BENJAMIN INDIVIGLIO, ROSE DIAZ, VETO GIORDENELLO, ANTHONY PHILLIP KOLM AND DANIEL WILLIAM MITCHELL, *Appellants*,

versus

UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court for the Southern District of Texas

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(October 31, 1957)

Before RIVES and CAMERON, Circuit Judges and DAWKINS, Sr., District Judge.

CAMERON, Circuit Judge: The indictment charged that the four appellants conspired with six others also indicted, with four named co-conspirators not indicted, and with other persons to the Grand Jury unknown in violation of §7237(a), Title 26, U.S.C.A., to commit various

offenses against the United States having to do with the possession, importation, purchase, sale and distribution of marijuana, heroin, and other narcotics. Thirty-six overt acts were charged in the conspiracy alleged to have continued from January 1, 1955 to June 3, 1956. The trial extended over about three weeks, and resulted in the conviction of all of the defendants. These four have appealed.

We have carefully read the record of more than 1300 pages and we entertain no doubt as to the sufficiency of the evidence to sustain the conviction of each of the appellants for the conspiracy charged, within the tests laid down in *Direct Sales Co. v. United States*, 1943, 319 U.S. 703; *Delli Paoli v. United States*, 1957, 352 U.S. 232, 236; and *Glasser v. United States*, 1942, 315 U.S. 60, 80.

The appellants, other than Giordenello, have no standing to object to the admissibility of the evidence obtained by the search ruled on by this Court (Judge Rives dissenting) in *Giordenello v. United States*, 5 Cir., 1957, 241 F. 2d 575.[1] The records of various long distance telephone calls were admissible as circumstantial evidence.[2] The acts of one or more of the co-conspirators, committed after the arrests of certain of the defendants, stand upon a different footing from declarations of co-con-

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[1] Goldstein v. United States, 1942, 316 U.S. 114, 121; Shurman v. United States, 5 Cir., 1955, 219 F. 2d 282, 288; Cantrell v. United States, 5 Cir., 1926, 15 F. 2d 953, 954; 20 Am. Jur., Evidence, §395; cases collected in Note 285 to the text of the fourth amendment in U.S.C.A.

[2] **Reynolds v. United States**, 225 F. 2d 123, 131, 132 (1955), and cases there collected; see, also, Ritter v. United States, 230 F. 2d 324, 327 (10 Cir., 1956).

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spirators, and were relevant as additional proof of the conspiracy.[3]

We find no reversible error, therefore, in these rulings of the trial court or the others discussed in the briefs. All of the appellants assign as error the denial by the court below of a motion seeking to compel the Government to turn over to them a written statement taken by the Government from one of its witnesses used at the trial. The argument is based upon the decision of the United States Supreme Court in *Jencks v. United States*, June 3, 1957, 353 U.S. 657.[4] The majority of this

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[3] Louis Joseph Abbate, et al. v. United States, No. 16,226, 5 Cir., m/s, citing Lutwak v. United States, 344 U.S. 604, 617 (1953); Eldredge v. United States, 62 F. 2d 449, 451 (10 Cir., 1932).

[4] The trial in the case before us was concluded Oct. 25, 1956 the decision of this Court in the **Jencks** case was rendered Oct. 26, 1955, 226 F. 2d 540, and the Supreme Court decision in Jencks was announced a few days after the present case was submitted in oral argument. In a supplemental brief, one of the appellants stated their position thus:

> "Five days after oral argument in this case, the United States Supreme Court decided that a defendant on trial was entitled to inspect statements made by government witnesses. . . .
>
> "This, of course, was the precise issue raised by the third error specified in this appellant's brief . . . The Jencks opinion clearly establishes that the denial of appellant's demand for inspection of the statement of Robert C. 'Mop' Adams was prejudicial and reversible error."

Appellants have not taken the position that decision of the present case is governed by the statute enacted in the closing days of the last session of Congress, 71 Stat. 595, 18 U.S.C.A. §3500, approved Sept. 2, 1957. (Appellant Giordenello refers to the statute in his supplemental brief and asserts that he was "fully entitled to the Adams statement, even applying the restrictive policies of the new statute." At the same time, he argued "that the restrictions which the statute places on the **Jencks** doctrine violated defendant's constitutional rights to have compulsory process to obtain evidence, and to enjoy due process of law."

The applicability of the new statute is not presented to us and is not considered by us.

Court is of the opinion that, under the facts of this case, the court below did not commit reversible error in denying access to the statement.

I.

The point presented to the trial court arose in this way. Adams, a government witness who had given a written statement to Narcotics Agent Finley, was under cross-examination by Attorney Walsh, who represented Rodney H. Peevey, a defendant who was convicted but who did not appeal. The entire evidential basis for the contention of appellants consists of one question by Attorney Walsh concerning that statement, relating solely to the alleged secreting of heroin by him in Peevey's home, and one answer by witness Adams:

> "Q. And isn't it true that in that statement you said that the transaction regarding the heroin occurred on Keller Street, rather than on Lawndale?
>
> "A. No, sir."

The jury having retired, Attorney Wash made an oral motion in these words:

> "Now, your Honor, at this time I ask that the Government be directed to produce for inspection by counsel the statement in question made to Mr. Finley on or about the middle of February, for purposes of cross-examination of this witness. I would like further to request the court to direct the United States Attorney to make available to the defense the minutes of the grand jury, to the extent, at least, that they deal with the transaction on Lawndale, to which this witness has now testified."

After brief argument, the Court stated: "Overrule the objection."

Attorney Walsh promptly noted an exception and, after further exchange of views Attorney Golding stated: "My defendant, Indiviglio, invokes a specific exception to the ruling." Thereupon Attorney Woody stated: "For the defendants whom I represent, Mr. and Mrs. Giordenello and Mrs. LaPorte, we join Counsel Walsh in his request . . ."[5]

There is no testimony in the record tending to contradict the quoted reply made by Adams on the witness stand, or to prove that this secreting of heroin by Peevey was on Keller Street instead of on Lawndale Street. The arguments made by appellant's attorney to support this oral request for an order to inspect the Finley statement, as well as appellants' briefs before us, are that the testimony of Adams was contradictory of one of the overt acts charged in the indictment.[6] It was undisputed that Adams did not testify before the Grand Jury and this allegation in the indictment would not have the effect of giving rise to a contradiction of the testimony of witness Adams.

At all events, Peevey did not appeal from the judgment of conviction, and the question which provoked the request for Adams' statement to the Narcotic Agent did not relate to any of the appellants who are parties to the appeal. It is apparent, therefore, that the record contains no evidence tending to support the implications contained in the question of Attorney Walsh, or to contradict or impeach the statement of the witness Adams;

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[5] It does not appear that appellant Kolm joined in the request.

[6] "[Overt Act] 22. On or about January 26, 1956, in the vicinity of Houston, Texas, Robert C. Adams concealed a quantity of Heroin in Rodney H. Peevey's home on Keller Street in Houston, Texas, said concealment occurred with the knowledge and consent of Rodney H. Peevey."

and it is the universal rule that a witness may not be impeached as to matters not material.[7]

The question before us for decision, therefore, is this: Whether the Court below *abused its discretion* in denying access to the Adams statement, and whether such action was shown to be sufficiently material and prejudicial to appellants to require reversal.

Appellants recognized in their brief and argument before us the necessity of showing as a predicate for the demand, the materiality of the statement as furnishing contradictory evidence. The quotation in the margin is taken from the "Brief for Appellants:"[8] Sitting as we

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[7] Several days after the foregoing motion was made, the court below wrote the word "Denied" upon a request addressed to the clerk of the court by appellants for the issuance of a subpoena duces tecum for William Thomas Finley, Enforcement Agent. For the reasons hereinafter set out the rights claimed by appellants were not thereby enlarged.

[8] "It was definitely shown that the statement was in existence and in possession of the appellee, through cross-examination of appellants' witness, Adams. Had the statement, as requested, been produced, **it is apparent that material contradictions should have prevailed insofar as this witness was concerned.** Clearly it was error not to require and to order appellee to produce the statement in question. Gordon v. United States, 344 U.S. 414; United States v. Krulewitch, 145 F. 2d 76, 79; United States v. Beekman, 155 F. 2d 580, 584 . . ." [Emphasis supplied.]

In the reply brief filed by appellants Indiviglio and Diaz the argument for production of the Adams statement was limited to prayer for its production for the inspection of the trial judge.—a wholly different request from that made in the motion upon which the appeal is predicated. Here is the statement made in the reply brief of these appellants: "It would have been a very simple matter for the court to have called upon the Government to produce it for inspection by the trial judge when request was demanded by attorneys for appellant. If the statement did establish contradictions and variances, in the interest of justice the trial court should have required the Government to permit appellants' counsel to inspect the same."

do as an appellate court, we are justified in finding error in the actions of the trial court only with respect to matters presented to that court, and limited to the contentions made to it as the basis for the requested action.

II.

We are dealing here essentially with the claimed right of discovery. This arises when, in adversary litigation, one party seeks to enforce an entry into the file of the other litigant for the purpose of obtaining a statement taken by the second litigant in preparation for trial.[9] It is well to take our bearings to discover the state of the law which faced the lower court when the motion to compel production of the Adams statement was made.

a) Discovery is governed, both in criminal and civil cases, by rules of practice promulgated by the Supreme Court under congressional authority.[10] The power conferred on the Supreme Court by the statute was in these words:

> "The Supreme Court of the United States shall have the power to prescribe, from time to time,

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[9] Except where constitutional rights are claimed, the Government is entitled to exactly the same treatment as any other litigant.

[10] By the Act of June 29, 1940, 54 Stat. 688, now 18 U.S.C.A. §3771, the Supreme Court was empowered by Congress to pass rules governing practice in the District Courts, and it promulgated them on Dec. 26, 1944 and they became effective on March 21, 1946. The Court had appointed an Advisory Committee headed by the late Arthur T. Vanderbilt, then Chief Justice of the Supreme Court of New Jersey, to draft the rules, and the Committee contained lawyers of eminence and distinction.

rules of pleading, practice and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court . . . in criminal cases in district courts of the United States . . . Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect."

Rule 16 is the only one dealing with the subject and reads as follows:

"*Rule 16*

Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable . . ."

The Advisory Committee's note under this rule states: "Whether under existing law discovery may be permitted in criminal cases is doubtful . . . *The entire matter is left within the discretion of the Court.*" [Emphasis added.] Since there is no evidence that the statement of Adams was obtained "by seizure or by process," it is obvious that the rule does not literally cover the

situation with which we are dealing. But the principle of discovery and inspection, whenever allowed, is established by the Rule and includes these ingredients: There must be a showing that the items sought "may be material to the preparation of his defense and that the request is reasonable." The Advisory Committee's note makes it clear that the sufficiency of that showing shall be within the discretion of the District Court.

(b) In the same year Congress passed the Act under which the rules were promulgated and shortly before the Committee and the Supreme Court collaborated in their preparation, fresh in their minds was the long-pending and much-publicized case of *United States v. Socony Vacuum Oil Co., et al.*, (argued Feb. 5th and decided May 6, 1940) 310 U.S. 150. What the Supreme Court there decided was the then existing law with respect to requiring the Government to permit the defendant to inspect statements taken from witnesses and it applies exactly to the situation now before us except in two respects: (1) the prior statement of the witnesses was made before the grand jury (but no question of privilege was raised, discussed, or decided), and (2) the statements had, during direct examination by the Government attorney, been read to the witnesses to refresh their recollection, but they had not been exhibited to the witnesses. In both respects, there was a stronger showing for requiring the Government to permit inspection of the statements used than in the case before us.

In *Socony* the Government used the grand jury to refresh the memories of its witnesses ninety times, involving reading to them more than one thousand lines

of previous testimony, which revealed about fifteen inconsistencies between what was read and their testimony on the stand. The trial court refused, in every instance, to permit defense counsel to inspect any part of the transcript which was being used in open court to refresh the recollection of the witnesses, and the Court of Appeals reversed. But the Supreme Court set aside its action and affirmed that of the District Court. Some of its language is applicable here, as it logically influenced Congress in its empowering the Supreme Court to formulate rules for the District Courts, and the Advisory Committee and the Supreme Court in working them out:

> " . . . Such use of grand jury testimony for the purpose of refreshing the recollection of a witness *rests in the sound discretion of the trial judge.* [Citing cases.] He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of the grand jury minutes is necessary or appropriate for refreshing his recollection. As once stated by Judge Hough, 'The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection.' . . . *No ironclad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropriate procedure is adopted to prevent its improper use. That again is a matter which rests in the sound discretion of the court.* (p. 233) . . .
>
> "Since there is no inexorable rule which under all circumstances entitles the witness and his counsel to see the prior statement made under

oath and since in this case the court itself examined and thus directly contro d the use of the grand jury testimony, we cannot say that the refusal to make it available to counsel for the defense is per se reversible error. *To hold that it was error in the instances here under review would be to find abuse of discretion,* where in fact we conclude from the entire record on this phase of the case that the judge supervised the procedure with commendable fairness. In sum, the selective use of this testimony and the precaution taken by the trial judge made it impossible for us to say that he *transcended the limits of sound discretion* in permitting it to be used by the Government without making it available to the defense. (p. 234)

". . . In addition, it clearly appears that the *use of this material was not prejudicial.* So far as the subject matter of the inquiry is concerned, that prior testimony was either cumulative or dealt only *with the minutiae* of the conspiracy. The record minus that testimony clearly establishes all the facts necessary for proof of the illegal conspiracy. No portion of it was dependent on *the minor facts* concerning which the memory of these witnesses was refreshed. Hence, the situation is vastly different from those cases where *essential ingredients of the crime were dependent on testimony elicited* in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted." (p. 235) [Emphasis added.]

During the period following the grant of power b Congress to the Supreme Court to formulate crimin rules, and while the process was in full operation, th Supreme Court, on April 27, 1942, rendered another d

cision declaratory of the law of discovery at the time the rules were promulgated and adopted, *Goldman v. United State*, 316 U.S. 129. A conspiracy indictment had been returned against Goldman based largely on testimony given by Government agents of what they had heard, by means of a detectaphone, of a conference in a co-conspirator's office.[11] The Government agents admitted that they had refreshed their recollection from notes made by them of what transpired in the lawyer's office. At a preliminary hearing and at the trial Goldman demanded the right to inspect the notes from which the witnesses had refreshed their recollection. The trial court refused the right and the Supreme Court affirmed, using this language:

> "We hold there was no error in denying the inspection of the witnesses' memoranda. The judge was clearly right in his ruling at the preliminary hearing, as the petitioners should not have had access, prior to trial, to material constituting a substantial portion of the Government's case.
>
> "We think it the better that *where a witness does not use his notes or memoranda in court*, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, *a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case.*" [Emphasis supplied.]

(c) As stated above, Rule 16 was intended primarily to cover discovery and inspection before the beginning

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[11] Both Goldman and the co-conspirator were lawyers.

of the trial. But it is generally accepted that its civil counterpart (Civil Rule 34), couched in similar language —neither providing any time limit—may be utilized during the course of the trial, 4 Moore's Federal Practice, Second Edition, pp. 2440, et seq., *United States v. Smith*, 9 Cir., 1941, 117 F. 2d 911. There is every reason to hold the same thing with respect to Rule 16. The discretion of the trial judge controls all such questions. Whenever inspection of documents in the adversary's file is requested, the trial court will allow it only under the limitations of materiality and reasonableness provided in the Rule.

(d) It is plain that the Supreme Court derived its sole rule-making power from the statute and that it could not modify or add to the provisions of any rule, except by following the procedure therein provided.

(e) The right to discovery and inspection under the Criminal Rules ought to be judged against the background of the Federal Rules of Civil Procedure, adopted eight years earlier, and the experience and decisions under them. The Supreme Court [12] pointed out that Rule 16 of Criminal Procedure was modeled upon Rule 34 governing civil procedure.[13] The language of Criminal Rule

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[12] Hickman v. Taylor, 329 U.S. 495.

[13] "Upon motion of any party showing good cause therefor and upon notice to all other parties . . . the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control . . ."

16 follows closely the language of the quoted Civil Rule and the last sentences of the two Rules are identical.[14]

The right of discovery under the Civil Rules is limited to cases where parties have shown good cause for the order, while the right in criminal cases is limited by the clause, "Upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." Access to statements of witnesses placed on the stand by a litigant has always been considered as governed by the discovery rule, and the Supreme Court first dealt with the subject in *Palmer, et al v. Hoffman*, 1943, 318 U.S. 109, 116.

One of Hoffman's witnesses testified on cross-examination that he had given him a signed statement, and Palmer's counsel asked to see it. The trial court offered to compel the production, but only upon condition that this would open the door for Hoffman to offer the statement in evidence. Palmer's counsel declined, and assigned as error that the court below had, under Rules 26(b) and 34 of Civil Procedure, committed error in declining to *permit unconditional inspection* of the statement. The Supreme Court declined to consider the assignment and, through Mr. Justice Douglas speaking for a unanimous court, used this language:

> "Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to de-

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[14] The more restricted scope of the Criminal Rule will be discussed **infra.**

termine whether the statement *contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous.* Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U.S.C. §391. He who seeks to have a judgment set aside because of an erroneous ruling *carries the burden of showing that prejudice resulted.* That burden has not been maintained by petitioners." [Emphasis added.]

In *Hickman v. Taylor, supra,*[15] Mr. Justice Murphy, speaking also for a unanimous court, noted the widespread controversy among members of the legal profession over the problem there presented, adverted to the very restricted discovery permitted by the English courts,[16] and held that Rule 34 and the other Rules of Civil Procedure involved *did not permit inspection by the adverse party as a matter of right,* but required a showing of good cause sufficient to warrant the trial court in using its discretion to permit inspection. In a specially concurring opinion Mr. Justice Jackson, joined in by Mr. Justice Frankfurter, used this language:

"Counsel for petitioner . . . bases his claim to it in his brief on the view that the Rules were

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[15] Argued Nov. 13, 1946, decided Jan. 13, 1947.

[16] Quoting from Odgers on Pleading and Practice 12 Edition, 1939, page 264, and referring to a compilation of English cases in 8 Wigmore on Evidence, 3rd Edition, 1940, pages 618-622. For a further discussion of the historical development of discovery and inspection, see also United States v. Bowman Dairy Co., 7 Cir., 1950, 185 F. 2d 159.

> to do away with the old situation where a lawsuit developed into 'a battle of wits between counsel.' But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. (Page 516) . . . All such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them. (Page 518) . . . The question remains as to signed statements or those written by witnesses. . . . Production of such statements are governed by Rule 34 and on 'showing good cause therefor' the court may order their inspection, copying or photographing. No such application has here been made; the demand is *made on the basis of right, not on showing of cause*. . . . [Emphasis added.]

Palmer v. Hoffman was written shortly before the Supreme Court filed with Congress the Federal Rules of Criminal Procedure, and *Hickman v. Taylor* was written immediately after their filing, and both were a part of the evolution in procedure which had been initiated by William Howard Taft a half century ago,[17] 'which included collaboration by lawyers, the Supreme Court, and Congress.

Discovery and inspection under the Civil Rules have always been conceded to be broader than under the Criminal Rules. "Under the Federal Rules of Civil Procedure, utmost liberality of discovery was envisaged and prescribed. Liberal discovery was, however, deemed un-

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[17] See "A Criminal Case In The Federal Courts" by Alexander Holtzoff, 1955 Federal Rules of Criminal Procedure (West), page 1.

suitable in criminal cases. It cannot be had as against the defendant without encroaching on his rights under the Fourth and Fifth Amendments. Likewise, it seemed unwise and inexpedient as a matter of policy to allow broad and unbridled discovery as against the Government. With this thought in mind, the Advisory Committee limited discovery in behalf of the defendant to such documents [as were made relevant and admissible] . . . upon a showing that the items were material to the preparation of the defense and that the request was reasonable."[18]

(f) The pre-Jencks history of the right in criminal cases of discovery and inspection includes two decisions rendered by the Supreme Court since passage of the Federal Criminal Rules.[19] In Bowman a motion had been filed under Rule 16 for inspection of certain books, papers and documents, and the Government agreed to an order and furnished those documents. Thereupon Bowman served on the Government attorneys a subpoena duces tecum calling for other documents, including narrative statements of witnesses and other writings not obtained by seizure or process. The Government moved to quash the subpoena on the ground that writings in its custody could be obtained only under Rule 16. The motion was

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[18] "A Criminal Case In The Federal Courts," by Alexander Holtzoff, West Publishing Company, 1955 Federal Rules of Criminal Procedure, p. 12.

And the Supreme Court, in the Gordon case, **infra** at page 419, fn. 9, noted that the discovery provisions of the Federal Rules of Civil Procedure were broader than those of the Federal Rules of Criminal Procedure.

[19] Bowman Dairy Co., et al v. United States, 1951, 341 U.S. 214, and Gordon, et al v. United States, 1953, 344 U.S. 414.

denied, the Government attorney refused to comply with the court's order and was held in contempt. The Court of Appeals for the Seventh Circuit reversed, holding that Rule 17 did not entitle a defendant to any broader discovery than that permitted under Rule 16.[20]

The Supreme Court vacated the judgment of the Court of Appeals and remanded the case for trial under its holding that the scope of materials which could be reached by subpoena was broader than under discovery provided by Rule 16.[21] This language from the opinion sheds light on the problem before us:

> "It was not intended by Rule 16 to give a limited right of discovery, and then Rule 17 to give a right of discovery in the broadest terms. . . . *Rule 17 (c) was not intended to provide an additional means of discovery.* Its chief innovation was to expedite the trial by providing a time and place *before trial* for the inspection of

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[20] United States v. Bowman Dairy Co., et al, 185 F. 2d 159, 163: "Considering the history of Rule 16, which shows the **evolution from the broad terms of its first draft to its final restrictive and limited terms,** it is difficult to believe that the framers of the Rule intended to authorize discovery and inspection of broad scope under Rule 17(c) pertaining to subpoena which was expressly prohibited by Rule 16 **which is the Rule intended to cover discovery and inspection.**" [Emphasis added.]

[21] The Court was careful to point out that "Where the court concludes that such materials ought to be produced, it should, of course, be solicitous to protect against disclosures of the identity of informants, and the method, manner and circumstances of the Government's acquisition of the material."

The attorney who refused to produce the documents called for in the subpoena was purged of contempt because the subpoena was too broad, and it had to be judged "in its entirety."

> the subpoenaed material . . . There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena."[22] [Emphasis added.]

Gordon involved a case where conviction was had largely on the testimony of one Marshall, an accomplice. On cross-examination Marshall admitted that he had given three or more statements to the FBI in which he did not implicate Gordon. The defendant thereupon asked the court to compel the production of those statements and also a transcript of proceedings had before the trial judge, who had held up the sentence under circumstances which would probably have warranted the jury in finding that Marshall had received at least tacit assurance of immunity. The requests were denied, and the Court of Appeals for the Seventh Circuit affirmed.[23] Practically the entire battle before the Court of Appeals revolved around whether the statements and the court records would be admissible if produced. That Court mentioned Rule 17(c), providing for subpoena duces tecum, but did not mention Rule 16, and concluded that, since Marshall had admitted on cross-examination everything which could have been shown by the records demanded, it was not an abuse of discretion for the court below to deny access to and use of these records.

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[22] Pages 220-221 of 341 U.S.

[23] United States v. Gordon, et al, 1952, 196 F. 2d 886.

The Supreme Court reversed in a decision based, in large measure, on whether the records would be admissible; and pointing out that the *Government apparently conceded that the Court below ought to have compelled production if the records constituted admissible evidence.* The Supreme Court dealt with the question before it as one of evidence to be solved by applying Criminal Rule 26,[24] and did not mention Rule 16.

The language of the opinion (pp. 418-419) shows clearly that the Court was not intending to deal further with the matter of discovery and inspection, but to base its holding upon the rules of evidence *under the Government's concession:*

> "Apparently, earlier common law did not permit the accused to require production of such documents. Some state jurisdictions still recognize no comprehensive right to see documents in the hands of the prosecution merely because they might aid in the preparation or preservation of the defense. *We need not consider such broad*

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[24] "In all trials the testimony of witnesses shall be taken orally in open court . . . **The admissibility of evidence and the competency and privilege of witnesses** shall be governed, except when an Act of Congress or these Rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [Emphasis added.]

Latitude is explicitly given to the Supreme Court in determining "the admissibility of evidence and the competency and privileges of witnesses." But the right to compel inspection must be exercised within the limitations fixed by the Rule—the only Rule as shown from quotations above—creating the right of discovery as one not theretofore existing.

doctrines in order to resolve this case, which deals with a limited and definite category of documents to which the holding of this opinion are likewise confined.[25]

"By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, *were contradictory of his present testimony*, and that the contradiction was as to relevant, *important and material matters* which directly bore on the main issue being tried: the participation of the accused in the crime. . . . In the light of our reason and experience, the better rule is that *upon the foundation that was laid* the court should have overruled the objections which the Government advanced and ordered production of the documents." [Emphasis added.]

It is clear that the Supreme Court, in *Gordon*, did not consider whether an accused should have access to documents merely because they *might aid in the preparation of his defense*. It held merely that the three statements which did show inconsistencies should be produced. The opinion of Mr. Justice Burton, joined in by Mr. Justice Harlan, in *Jencks*,[26] demonstrates that the historical rule has always been that *use* of a witness' statement should

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[25] The limited and definite category of documents to which the Gordon opinion was confined was three statements given the FBI by a witness who admitted that those statements did not include Gordon. In other words, the witness admitted that the statements if produced would impeach the testimony given at the trial by showing clear inconsistencies.

[26] 353 U.S. 678.

be confined to those instances where inconsistency is shown:

> "Petitioner requested only that the record be produced to the trial court. He is entitled to no more. . . . But if the reports [submitted to the trial court] do not contain contradictory or exculpatory material helpful to petitione no possible prejudice could have resulted from the trial court's denials of petitioner's motions. . . ."

In the case before us the motion demanded that the Adams statement be forthwith delivered direct to appellants without any showing of probable contradiction or of prejudice to appellants. Under *Palmer v. Hoffman, supra,* appellants carried the burden of showing that prejudice resulted as well as of bringing the Adams statement before us.

III.

These principles are axiomatic and have, through the ages, guided courts of every rank and jurisdiction: "The general rule . . . is that an appellate court will consider only such questions as were raised and reserved in lower court."[27] "It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review. Under this rule a party will not be permitted, in the appellate or reviewing court, to assume a position inconsistent with that occupied by him in the trial court with respect to the grounds or theory of recovery or relief or of defense or opposition, the nature of sufficiency of pleadings, the ad-

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[27] This text of 3 American Jurisprudence, "Appeal and Error," §246, p. 25, is supported by more than fifty decisions of the Supreme Court.

missibility or sufficiency of evidence, or the burden of proof." [28]

"The general rule that an appellate court will consider only such questions as were raised in the lower court, and the rule requiring adherence to the theory pursued below, operate ordinarily to preclude the consideration, on appeal or review, of grounds of defense or of opposition not asserted and relied on in the trial court." [29]

"Under the general principle requiring definiteness and particularity in the statement of the grounds of objections, motions, and exceptions, where the ground upon which it is claimed that testimony should have been admitted were not stated at the trial, the propriety of its exclusion will not be considered on review." [30]

It is plain, therefore, that the Supreme Court, in *Jencks* exercising as it was only its appellate jurisdiction, was empowered to put the trial court in error only by considering its ruling with respect to what appellant asked it to do and based on the theory relied on by appellant in presenting his motion. Appellant asked the trial court to require the Government to present to the court—not to appellant—the Matusow and Ford statements, basing his requests solely upon the assertion that he had established by proof that these statements probably contradicted the testimony given on the witness stand. The

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[28] Ib. 253, pp. 35-37. The first sentence is supported by fourteen Supreme Court cases.

[29] Ib. §287, p. 59; thirty-two Supreme Court cases are listed as supporting the text.

[30] Ib. §353, p. 97, citing a number of Supreme Court decisions in support. Decisions from all of the states are cited in connection with the foregoing quotation and no contrary statement has been found. And cf. our recent case holding the same thing, Matthews v. United States, 1954, 217 F. 2d 409.

Supreme Court had the power to decide that, on the facts in evidence, the court below had abused its discretion in denying the request as it was presented at the trial. But, under these universally accepted principles, its competence did not go beyond that.

IV.

It is a rule of universal application by the Supreme Court, as well as the other courts of this country, that no opinion can be considered as binding authority unless the case calls for its expression.[31] American Jurisprudence[32] drew upon scores of Supreme Court decisions in its distillation of the rule to these words: "The language and general expression in an opinion of the court are to be taken in connection with the case . . . and must be construed in the light of the issue which was in controversy in the case and which was decided . . . They must not be extended beyond that for the purpose of authority in another and different case. In other words, to make an opinion a decision there must have been an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties."[33]

The rule was graphically epitomized by Mr. Justice Reed in the controlling opinion in *Darr v. Buford, Warden*, 339 U.S. 200, 214:

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[31] Cf. Carroll v. Carroll's Lessee, 57 U.S. 275.

[32] 14 Am. Jur., Courts, §79, pp. 291 et seq.

[33] See same text, §83, p. 295: "The doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the court or judge outside the record or on points not necessarily involved therein."—Citing a number of Supreme Court cases.

"We doubt the effectiveness of a voluntary statement on a point not in issue. Compare Bowen, L.J. in *Cooke v. New River Co.*, 38 Ch. D. 56, 70-71: '..... like my Brothers who sit with me, I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgment comes with far more weight and gravity when they come upon points which the Judges are bound decide, and I believe that *obiter dicta*, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.' *Cohens v. Virginia*, 6 Wheat. 264, 339-400; *Wright v. United States*, 302 U.S. 583, 593-594."[34]

V.

In order that the decision of the Supreme Court in *Jencks* may be tested as to its force under *stare decisis* it is necessary to consider just what was there before the trial court and its ruling thereon. The Government's witness Matusow, a member of the Communist party in the employ of the Government, had testified that he

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[34] The quotation combines the text of the opinion with footnote 38.

The words of Mr. Justice Frankfurter, with whom Mr. Justice Black joined, dissenting are helpful here:

"Decisions on matters of procedure within the court's control ought not to be like shifting sand. Quick fluctuations in them should be avoided unless a rule of practice has proven itself mischievous in practice. . . . Respect for an explicit adjudication on a matter of procedure very recently rendered after the fullest consideration, as well as the soundness of the decision, should lead us to adhere to **Wade v. Mayo.**" [p. 221]

And see the language of Mr. Justice Jackson in Armour, et al v. Wantock, et al, 323 U.S. 126, 132-133: "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion."

had made a number of written and oral statements to the Government, and Jencks' attorney had sought in cross-examination to develop that those statements were inconsistent with testimony given at the trial as well as with testimony given by him before a Senate Committee. We set out in the margin a portion of what transpired to demonstrate what the Court below ruled upon, and therefore what was before the Supreme Court when it rendered the Jencks decision.[35]

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[35] "Mr. McTernan:

"If the Court please, at this time, we move you for an order requiring the prosecution to produce in court the reports submitted to the FBI by this witness . . . We ask that in doing this, the following procedure be adopted: that the Court require that the reports be produced and handed to the Court for inspection. We desire those portions of the report which will contradict the witness' testimony. In view of the disparities in his testimony so far, I submit that there is a good ground for making this examination. **We ask that those portions of the reports, which in the Court's view after reading them have an evidentiary value in this case for impeachment, be made available to us for cross-examination . . .** What we are concerned with is **obtaining written declarations of this witness which are inconsistent with his testimony;** and we assert to the Court, on the basis of the Krulewitch case and other cases, that we have a right to obtain the witness' prior statements in order to show inconsistencies, if they exist; and a denial of this right to look at the statements would be in this case reversible error." [Emphasis added.]

The Government's attorney responded by attempting to differentiate the Krulewitch case (upon which chief reliance was based) from the one then before the trial Court, stating: "There the witness admitted on the witness stand that she had given a statement to the FBI that was entirely contradictory of what she has testified to on the stand, . . . I submit here that this witness has not varied one particle from any of those other statements he has made and the statements he is making on the witness stand now."

Jencks' counsel made a like motion with respect to the statements given by Government witness Ford and based upon the same grounds.

The trial judge overruled both motions manifestly upon his conclusion that the rejuisite contradiction and inconsistency had not been shown. The entire battleground in the court below was based on this single point, and in the argument before the Court of Appeals for the Fifth Circuit the same position was maintained.

Under the authorities discussed *supra*, the Supreme Court had nothing before it but the question whether the trial court erred in denying the two motions based and argued solely on the predicate that a showing of inconsistency had been made; and upon their concession, based upon the law as then well established, that the statements must first be submitted to the court for its decision on relevance and materiality. The Supreme Court was without authority to go beyond the ruling of the trial court responding to the action it was importuned to take. Whatever branch of procedural jurisprudence should be held to control, the trial court was *possessed of discretion* to do what it did do, and the appellate court had jurisdiction only to determine *whether that discretion was abused*. There was testimony in the *Jencks* record from which the trial court could have found that the statements in the FBI files contradicted or were inconsistent with those made on the witness stand. The reversal of its ruling by the Supreme Court could, and must be considered as, founded upon the assumption that it felt that the trial court erred in exercising its discretion against Jencks' motion.

VI.

The decision in *Jencks*, within the limits of the points actually decided, is the law of that case. But it is not

the law of this case—nor the "law of the land." Mr. Justice Jackson thus defined the character of the Supreme Court's function in the American System:[36]

> "The Court also is dependent on the political branches of its powers in other vital respects. Its only irrevocable jurisdiction is original. . . . . In all other cases it has appellate jurisdiction. . . . But perhaps the most significant and least comprehended limitation upon the judicial power is that this power extends only to cases and controversies. . . . The result of the limitation is that the Court's only power is to decide lawsuits between adversary litigants. . . . Also, as an appellate court, it properly can act only on the state of facts revealed by the record made in the court below, supplemented sometimes by general information of which it may take judicial notice.
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> . . . And when it is all over, judicial decree, however broadly worded, actually binds, in most instances, only the parties to the case. As to others, it is merely a weather vane showing which way the judicial wind is blowing—a precedent that the Court in a similar case is likely to follow. Its real weight in subsequent cases, however, will depend on many factors, such as the quality of the prevailing opinion, the strength of any dissent, the acceptance or criticism by

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[36] "The Supreme Court In The American System of Government," Harvard University Press, 1955. The quotation brings together several sentences from pages 11-13.

the profession, and the experience in application of the rule."[37]

The reliance of appellants on *Jencks* would have a firmer basis if the facts there were precisely the same as here. But clearly they are not. The Supreme Court points out that Matusow was working undercover for the Government while posing as an intimate friend of

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[37] The unwisdom of attempting to limit stare decisis to the holding of one case as well as the difficulty in divining the direction in which that "weather vane" points is illustrated by this language from the dissenting opinion of Mr. Justice Clark, concurred in by Mr. Justice Burton, in the case of Reed, Superintendent v. Covert, June, 1957, 354 U.S. 1, 78: "Furthermore, four of my brothers would specifically overrule and two would impair the long recognized vitality of an old and respected precedent in our law, the case of **In re Ross,** 140 U.S. 453 (1891), cited by this Court with approval in many opinions and as late as 1929 by a unanimous Court in **Ex parte Bakelite Corp.,** 279 U.S. 438, 451. And, finally, the Court reverses, sets aside, and overrules two majority opinions and judgments of this Court in these same cases, reported in 351 U.S., at 470 and 487, and entered on June 11, 1956, less than 12 months ago. In substitute therefor it enters no opinion whatever for the Court. It is unable to muster a majority. . . . But, worst of all, it gives no authoritative guidance as to what, if anything, the Executive or the Congress may do to remedy the distressing situation in which they now find themselves."

And the Congressional Record of Feb. 18, 1957, page 1896, reports a speech made on the floor of the United States Senate by Senator Stennis in which he lists ten Acts of Congress in the last twenty years passed "for the sole and specific purpose of reversing Federal Court opinion arrived at contrary to the intent of Congress in enacting the statutes under consideration;" and in which the Senator made the statement: ". . . the Court has also upset its own body of case law to the extent that judicial precedent probably means less to the Supreme Court of the United States than in any other court, State or Federal, in the country. Actually 36 cases have been specifically overruled by the Supreme Court of the United States since 1932. This is 7 more than the 29 which were overruled by the same Court during the first 142 years of its history . . ."

Jencks, and that he had testified for the prosecution in other cases. The Supreme Court indicates clearly that it felt that Jencks' conviction could not stand without his testimony. While, in the present case, the Government placed before the jury thirty-three witnesses and 1300 pages of testimony, and the guilt of these appellants was abundantly established without any reliance upon Adams' testimony.

Moreover, Matusow had, on a motion for new trial, taken the stand in Jencks' behalf and attempted to imply that some of his testimony at the trial was false; and he had published a book under the title "False Witness"[38] in which that implication was further developed. In this case, the record contains no evidence at all tending to show that any testimony of Adams relating to appellants was open to the slightest question.

It is further clear that, under *stare decisis*, *Jencks* would not stand alone, but would take its place alongside of *Socony*, *Goldman*, *Palmer*, *Hickman*, *Bowman*, *Gordon* (none of which have been overruled), and would be considered merely as one case in the general body of the law developed through the ages. Whatever undiscovered power the Supreme Court may have in a given case to by-pass the universally accepted rules of appellate procedure above quoted, we have no such power.

We sit as an appellate court in judgment upon the rulings of the Court below as contained in the record and as based upon the theory of right claimed by appellants and presented to that court. And we must follow the established principles above discussed and as exemplified by

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[38] Jencks v. United States, 5 Cir., 1955, 226 F. 2d 553, 558.

the Supreme Court decisions listed in this paragraph, expressing the best thought of the Justices, several of whom participated in *Jencks*, over a period of two decades during which the Civil and Criminal Rules were adopted. We are without power to grant appellants more than they requested of the court below, or to grant relief upon a different theory from that advanced in the court below and before us.[39]

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[39] As stated in fn. 4 **supra**, we have not been asked to apply the new Federal statute to this case. And the fact that its terms are somewhat at variance with the conclusions here reached does not tempt us to doubt their accuracy. Nor are we influenced by the statement of the Attorney General to the Senate Sub-Committee on the Judiciary on June 28, 1957, which doubtless accounts for some of the provisions of the new statute. The second paragraph of that statement reads as follows:

"The issue in the **Jencks** case involved the procedure under which a defendant may inspect a statement of a government witness, in order to impeach the credibility of such witness. The argument of the case centered on whether it was necessary for the defendant to establish a foundation of inconsistency between the testimony of the witness and the statement before the statement was made available to the defense. The Court held that numerous lower court cases holding such a foundation was necessary were wrong, and that statements which relate to the testimony of the witness must be made available to the defense without requiring the defense first to establish some inconsistency. We accept this principle."

No pre-**Jencks** law has been found which might have led the Attorney General to accept the principle. It seems logical, therefore, that the acceptance was founded on the conclusion that it was better, in the hectic closing days of the congressional session, to make some concessions in order to be relieved of the onus of other features of the **Jencks** decision which led Mr. Justice Clark, former Attorney General, to say concerning the majority opinion in **Jencks** (353 U.S. 681-682):

"Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets."

In reaching these conclusions, we have given ear to the teachings of history and tradition, weighing the facts before us in the light of reason and common sense, in response to the duty resting upon us to do justice to the appellants while, at the same time, reaching a result which will tend to combat the widely expressed idea that the courts are manifesting judicial irresponsibility in their apparent efforts to "protect the big bad wolf from little Red Riding Hood."[40] In deciding what is material and reasonable (Rule 16), or in delineating what is "in the light of reason and experience" (Rule 26, assuming that it applies) we cannot fail to take account of the state of the age-old struggle between organized government and organized crime. The fair inference from this record is that the Government has at great expense turned up and convicted, by overwhelming evidence, some of the leaders of the narcotic traffic which is taking such grievous toll of the health and morals of the people, particularly the youth of this land. In a recent message to the legislature, the Governor of New York stated: "The number of addicts has continued to grow. Narcotic arrests in New York City alone have risen six hundred percent in the past decade; arrests of persons under twenty-one have increased two thousand three hundred percent."[41]

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[40] Blackstone makes the statement (3 Bl. Comm. 391) that "next to doing right, the great object in the administration of public justice should be to give public satisfaction."

Mr. Justice Cardoza used this language in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 122: "Justice, though due to the accused is due to the accuser also. The concept of fairness must not be strained till it be narrowed to a filament. We are to keep the balance true."

[41] See 233 F. 2d 280, and fn. 6.

These appellants are entitled to all constitutional safeguards—and they do not contend that any were denied them—and to a fair trial. That they have had. The error they complain of is one relating to procedure alone. Appellants, arguing under the facts of this case for reversal, are more "concerned with the mere etiquette of trials and with the formalities and minutiae of procedure" than with the substantial merits.[42] Such matters are, under our system, entrusted to the trial court, and on appeal, its judgment should be approved unless we can say that there is a "clear showing of prejudicial abuse of discretion . . ." *Michelson v. United States*, 335 U.S. 469, 480. To do this here we would be compelled to hold that as a matter of law appellants were wrongfully denied access to the Adams statement and that as a matter of law they were prejudiced by failure to produce it. It is our view that the court below did not abuse its discretion.[43]

Moreover, it is clear that appellants were not prejudiced by the challenged ruling of the trial court. We repeat what the Supreme Court said in the recent case of *Lutwak v. United States*, 344 U.S. 604, 619-620:

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[42] Cf. Bihn v. United States, 328 U.S. 633, 638; Socony Vacuum v. United States, supra, at p. 235, and Whitman, Federal Criminal Procedure, p. 398.

[43] In "The Doubtful Omniscience of Appellate Courts," 41 Minnesota Law Review No. 6, page 751, Charles Alan Wright quotes from Dean Leon Green this statement: "Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system."

"In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one. This is a proper case for the application of Rule 52(a) of the Federal Rules of Criminal Procedure.[44] We hold that the error was harmless."

AFFIRMED.

RIVES, Circuit Judge, Dissenting:

With deference, I adhere to the views expressed in my dissenting opinion in *Giordenello v. United States*, 241 F. 2d 575 (5th Cir., 1957), and for the reasons there stated would hold that the evidence obtained by the search of Giordenello was not admissible against him.

I think also that the present decision conflicts with the decision of the Supreme Court in *Jencks v. United States*, 353 U.S. 657. Robert C. Adams, a co-conspirator not indicted, testified to various unlawful dealings with Giordenello and Kolm, and that Kolm described Benny Indiviglio as an Italian in New York City through whom he secured heroin from overseas, and told him that Benny had a common law wife by the name of Rose, inferably Rose Diaz alias Rose Diviglio. If believed by the jury, Adams' testimony was most damaging to each of the four appellants. Adams had signed a written statement covering all of his transactions relating to these appellants and

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[44] "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

had given it to Narcotics Agent Finley. Adams' statement was certainly in the possession of the United States, and probably under the control of the United States Attorney. The district court declined to permit the attorneys for appellants to inspect it for the purpose of cross-examining Adams. That ruling of the district court was, of course, prior to the decision by the United States Supreme Court of *Jencks v. United States*, 353 U.S. 657, 665, et seq. That decision, I think, should require a reversal of these judgments of conviction. I therefore respectfully dissent.

APPENDIX "B"

CONSTITUTIONAL AMENDMENTS INVOLVED

AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V—DUE PROCESS

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *"

APPENDIX "C"

JUDGMENT

Extract from the Minutes of October 31, 1957

BENJAMIN INDIVIGLIO, ROSE DIAZ, VETO GIORDENELLO, ANTHONY PHILLIP KOLM AND DANIEL WILLIAM MITCHELL,

versus

UNITED STATES OF AMERICA

No. 16440

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

"Rives, Circuit Judge, dissenting."

Office - Supreme Court, U.S.
FILED
APR 1 1958
JOHN T. FEY, Clerk

No. 753

In the Supreme Court of the United States

OCTOBER TERM, 1957

BENJAMIN INDIVIGLIO and ROSE DIAZ, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 1321-1355; Pet. App. A, 31-65) is reported at 249 F. 2d 549.

JURISDICTION

The judgment of the Court of Appeals was entered October 31, 1957 (R. 1356). A petition for rehearing was denied on December 5, 1957 (R. 1391). Mr. Justice Whittaker, on December 23, 1957, granted an extension of time within which to file a petition for writ of certiorari to and including February 3, 1958. The petition was filed on January 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the motion to suppress evidence made by petitioner Rose Diaz was improperly denied for lack of standing.

2. Whether the evidence seized from the defendant Giordenello at the time of his arrest was improperly received in evidence against all petitioners.

3. Whether the failure to turn over to the defense a statement by a government witness constituted prejudicial error.

4. Whether the judge adequately instructed the jury as to evidence admitted only against particular conspirators.

STATEMENT

In the United States District Court for the Southern District of Texas, petitioners and others [1] were convicted of conspiracy to violate the laws relating to marihuana and narcotics from January 1, 1955 to June 3, 1956 (R. 4-14), (R. 1216-1217). Petitioner Indiviglio was sentenced to four years' imprisonment and a twenty-five dollar fine (R. 1251). Petitioner Diaz was sentenced to two years' imprisonment and a fine of twenty-five dollars (R. 1253). On appeal, the Court of Appeals affirmed, one judge dissenting.

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[1] A separate petition for a writ of certiorari has been filed in *Veto Giordenello* v. *United States*, No. 515 Misc., on behalf of another of the defendants at this trial. In the Memorandum for the United States filed February 28, 1958, in that case, we urged that consideration of that petition for certiorari be deferred pending decision on the merits of *Giordenello* v. *United States*, No. 549, certiorari granted, 355 U.S. 811.

The significant evidence may be summarized as follows:

1. In the spring of 1955, the defendant Veto Giordenello engaged in various transactions involving marihuana with the defendant Kolm and co-conspirators Adams and Hoge. In the latter part of December, 1955, Giordenello, in the presence of Kolm and defendant Peevey, told Adams that he had brought a quantity of heroin from Chicago, Illinois, and offered to sell some of it to Adams (R. 119-121). Giordenello told Adams that he obtained his supply from an Italian named "Benny" in New York City who had a common-law wife named "Rose" (R. 122-123, 198-199). On January 5, 1956, Rose Diaz received in New York and cashed a Western Union money order in the amount of $2,500, sent from Chicago. (R. 995, 997, 1001, 1003; Govt. Ex. 50). On January 12, 1956, Giordenello sent a $500 Western Union money order to "Mr. Benny", New York City. This money order was cashed by petitioner Indiviglio (R. 548-550, 554, 721-723, 731; Govt. Ex. 19).

On November 10, 1955, a telephone was installed at 728 Columbus Avenue, New York City; the subscriber was petitioner Diaz (R. 695). Records showed that between December 18, 1955 and January 12, 1956, three calls were made from that number to "Veto" (Govt. Ex. 37A, 37D, 37E) at an unlisted number for Veto Giordenello in Chicago (R. 854, Govt. Ex. 42A-C). Two collect calls from "Veto" in Chicago were accepted on December 31, 1955 and January 4, 1956 (Govt. Ex. 37B and 37C).

2. About January 26, 1956, Adams agreed to sell "paper", *i.e.*, glassine envelopes of heroin, to Speedy

Williams and Charles Leonard (R. 132, 134). Adams had two "papers" concealed in Peevey's apartment and when he came to get them there, he met Peevey and Kolm at the apartment. In a few minutes Giordenello joined them (R. 132-134). The group were not able to obtain the six to eight "papers" they desired at that time (R. 135), so Adams and Kolm delivered only the two packages of heroin that had been hidden with Peevey (R. 135-136, 765-767, 773-774, 802-B, 803; Govt. Ex. 5). At the same time, Adams agreed to deliver more heroin to Leonard the following day (R. 139, 769).

On or about January 22-23, 1956, Giordenello had asked a friend of his, co-conspirator Leland E. Smith, for permission to leave a package in Smith's garage. Permission had been granted and the package had been left (R. 207-210, 214). Accordingly, on the morning of January 27, 1956, Adams and Giordenello went to the home of Smith on Brownsville Street, Houston, Texas, where Giordenello said that he had heroin "stashed" (R. 137-138, 196). Smith was not at home, but Giordenello found the cache without Smith's help and took eight papers of heroin. Adams and Giordenello then drove to the prearranged meeting place (R. 137-138). Adams met Leonard (who was a police officer acting undercover), received payment, and delivered the heroin (R. 138, 140-141, 414-417, 769-772, 802; Govt. Ex. 4). Adams then picked up Giordenello and they shared the money received (R. 141).

At about 7:00 p.m. that evening, January 27, 1956, surveilling officers saw Giordenello drive away from his house. He was closely followed by defendant

Mitchell in another car (R. 231). Giordenello drove to the home of Leland Smith (R. 232) and went with Smith into a garage where he opened a package containing a white powder which Giordenello called heroin (R. 210-212). Smith walked out of the garage with Giordenello who carried with him a brown paper sack (R. 233-235). As they reached the fence surrounding Smith's issue, both were arrested by agents Finley and Shelton (R. 210-212, 226, 232-233, 235). Giordenello was carrying the package in his hand at the time of the arrest and it was taken from him then (R. 235). Upon examination and analysis, it turned out to contain something less than six ounces of heroin hydrochloride (R. 421-424, 804-805; Govt. Ex. 1, 17A-E).

The validity of the search of Giordenello's person is involved in No. 549, presently before the Court for argument, and No. 515 Misc., pending on petition for a writ of certiorari. The evidence seized was admitted against all the defendants and the validity of that search is therefore also an issue raised by this petition.

3. At about 11:00 p.m., January 27, 1956, Giordenello was taken to the local office of the Federal Bureau of Narcotics, where he asked for and received permission to call his wife Ardelle, who happened to be in Alto, Texas (R. 271, 331). Agent Finley heard Giordenello's portion of the conversation, during which Giordenello told his wife that he had been arrested and said, "Yes, they got it all" (R. 331).

On January 31, 1956, Ardelle Giordenello sent a telegram to "Benny, Dell's Cafe, 916 Eighth Avenue

between 54th and 55th, New York", asking him to call her immediately (R. 353; Govt. Ex. 11, limited to Ardelle and Indiviglio).

4. On May 12, 1956, narcotics agents Durkin and Zurbo visited Dell's Cafe, 916 Eighth Avenue, New York City, in an effort to locate a man known as "Benny" who owned the bar (R. 555-557). They saw Benny Indiviglio come into the cafe at about 11:00 p.m. He had the keys to the cash register in his possession and one of the bar maids referred to him as "the boss" (R. 557). A surveillance was undertaken (R. 586) and Indiviglio was seen in the vicinity of 728 Columbus Avenue (R. 560). At that time the agents had information that Giordenello's source of supply was a man in New York known as Benny, who had a bar, and that Benny's narcotics were hidden for him by a woman living "uptown" (R. 572). They also knew that Rose Diaz had received $2,500 in a money order (R. 607) (see p. 3 *supra*).

At about 4:00 a.m., May 22, 1956, agents Durkin and Dolce saw Indiviglio and two other men (one known to be trafficking in narcotics (R. 570)) drive away from Dell's Cafe in a black Lincoln automobile. The agents followed, accompanied by two New York City detectives (R. 558). Indiviglio got out of the Lincoln at 96th Street and Columbus Avenue and apparently saw the agents and Detective Roehling when they got out of their car to continue the surveillance, for he glanced over his shoulder, hastened his pace, and ducked into the doorway of 728 Columbus Avenue. At that point Roehling stopped petitioner Indiviglio, identified himself, and asked for identification. Indiviglio gave identificaton, said that

he lived on East 106th Street, and denied knowing anyone living at 728 Columbus Avenue (R. 559-560).

Three agents then went to the apartment of petitioner Diaz, which was in the building (under the name "Diviglio" (R. 732)), and knocked. A woman answered, saying "Who is it?" Agent Dolce replied, "Benny". The door was then opened by Rose Diaz. Detective Rochling told petitioner Diaz that his group was there on a narcotics investigation. Rochling amplified the statement of their purpose, saying that he had reason be believe narcotics were concealed on the premises. According to the agents, petitioner Diaz said "If you think there is narcotics here, you go ahead and look" (R. 560).

Petitioner Indiviglio was brought up to the apartment by another detective and searched (R. 560-561, 573). A card was found in his wallet which had Giordenello's name and Chicago address on it (R. 573, 578; Govt. Ex. 27).[2] The apartment was searched (R. 561) and the apartment lease, signed by Indiviglio and Diaz, was found (R. 631-632, 732-733; Govt. Ex. 33). The books for Dell's Cafe were also found (R. 747-750, 755; Govt. Ex. 40). A card was found which bore the notation "Linda Pitrinella", (Ardelle Giordenello's alias), "2901 Airline Drive, Houston, Texas" (R. 574, 579; Govt. Ex. 29-C). A white powdery substance was found hidden in the baseboard of the bedroom closet (R. 582-583). The substance was shown to Indiviglio and he spontaneously said, "You can't put that coke on me" (R. 583). On subsequent

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[2] The exhibit was admitted only against Indiviglio and Giordenello (R. 579).

analysis the substance turned out to be cocaine (R. 630, 646-647; Gov. Ex. 32).[3]

DISCUSSION

1. The trial commenced on October 2, 1956, with two days of hearings on motions to suppress by other defendants. On October 15, 1956, Mr. Campbell, counsel for petitioner Diaz, moved to suppress the cocaine found in the apartment at 728 Columbus Avenue, New York City (R. 1161-1162). That afternoon (R. 502), as the government was introducing the card found in petitioner Indiviglio's wallet at the time of his arrest (R. 578), and the card found in the apartment bearing the name "Linda Pitrinella" (R. 579), objection was made that the items were the result of an illegal search and seizure (R. 578, 579).

The following day, petitioner Diaz moved to suppress "a social security card bearing my name; a photostatic of a birth certificate bearing my name and various slips of paper with other names thereon" (R. 1164). In asking for permission to file this motion, counsel for Diaz said he did not want to delay the trial, but that he had had no reason to believe that any papers would be introduced in the case (R. 585). The trial judge agreed to discuss the motion with counsel at a later time (R. 585). After the government had rested, he ruled that Diaz's motions were legally insufficient for failure to allege ownership (R. 1038, 1043).

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[3] The lease and other exhibits found in the apartment were admitted only against Indiviglio and Diaz (R. 580, 631).

The first motion, to suppress the cocaine, alleged (R. 1161-1162):

> On or about May 22, 1956, I was lawfully in the premises of my apartment at 728 Columbus Avenue, New York City, New York, at which time several men entered my apartment. These men were Federal and State Agents to the best of my knowledge and belief. The said men forced me into my kitchen while one of the others searched my bedroom. At said time I was placed under arrest.
>
> All of this was done without a search warrant. My premises were searched without a warrant. The said officers, without a warrant, searched and removed the following articles. A quantity of narcotics approximately 29 grains of cocaine.
>
> * * *
>
> The said agents had no right to enter my premises and make a search and place me under arrest without a warrant.

The second motion, to suppress the documentary evidence, alleged (R. 1163-1164):

> On or about May 22, 1956, I was lawfully on my premises, at 728 Columbus Avenue, New York, New York. That several men came to my apartment on said date. * * * Thereafter these men entered my apartment and I was placed under arrest. Then one of these men went to my bedroom and thereupon seized some of my personal papers and belongings. I do not consider that I gave my consent to any of the foregoing.

The judge did not deny the motions as untimely, as he might well have been justified in doing under Rule 41, F. R. Crim. P. At the time he denied the

motion of Diaz, he conducted a hearing on a motion by defendant Mitchell, also filed after the trial had commenced (R. 1038, 1045-1061). For that reason, despite the delay, the validity of the ruling on the motions to suppress could properly be attacked on appeal. *United States* v. *Di Re*, 159 F. 2d 818 (C.A. 2), affirmed 332 U.S. 581.

We believe that the district judge was undoubtedly in error in ruling, as he did (R. 1038, 1043), that the motions of petitioner Diaz were legally insufficient for failure to allege ownership. While she did not allege ownership of the cocaine, she did clearly allege that it was her apartment that was illegally entered. One whose home has been unlawfully invaded has standing to move to suppress evidence taken by an unlawful invasion of his privacy. *Agnello* v. *United States*, 269 U.S. 20, 32-34. A hearing should therefore have been held to determine the motion on its merits.

For this reason, we believe that the conviction of petitioner Diaz and of petitioner Indiviglio, against whom the evidence secured by the search was also admitted (cf. *McDonald* v. *United States*, 335 U.S. 451, 456), must be reversed irrespective of the other issues in the case.

2. The evidence secured by the search of Giordenello's person was admitted against these petitioners as well. The validity of that search was brought into question when the evidence was first introduced at an earlier trial against Giordenello alone, and the matter is presently before this Court in *Giordenello* v. *United States*, No. 549. While, for the reasons stated

above, we believe that the conviction of these petitioners should be reversed, irrespective of the ruling in No. 549, we would agree that if the search was held invalid in that case, admission of the heroin into evidence at this trial might well furnish an independent ground for reversal against these petitioners as well as Giordenello. If the evidence should have been suppressed as to Giordenello, it would not have been available against these petitioners on a charge of conspiracy involving Giordenello. For that reason, the Court may wish to defer consideration of this petition, as well as that filed by Giordenello in relation to this trial (No. 515 Misc.), until decision on the merits in No. 549.

3. The other issues raised by petitioners, as to alleged trial errors in failing to turn over to the defense a statement by government witness Adams and in instructing the jury as to evidence admissible only against particular conspirators, need not be reached if there is to be a new trial. These issues are discussed in the Memorandum for the United States filed in response to the petition for a writ of certiorari in *Giordenello* v. *United States*, No. 515 Misc. We are lodging with the Clerk, ten additional copies of this Memorandum.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

April 1958

U. S. GOVERNMENT PRINTING OFFICE: 1958 459856 1229